

March 6, 2019

Enclosed is the District Attorney's Final Report on the fatal shooting of Joshua Ryan Pawlik which occurred on March 11, 2018. I have thoroughly reviewed the Report. I concur in the conclusions that the evidence does not support criminal charges being filed against Sergeant Frank Negrete, Officer William Berger, Officer Brandon Hraiz and Officer Tanaka.

When a law enforcement officer is involved in a shooting that results in the death of an individual, there are grave and great impacts on the community, on the family and friends of the person, on the police officer and the police agency. The Alameda County District Attorney's Office, and I as the District Attorney, take seriously the need for accountability. As such, it is our legal and ethical obligation to conduct a separate, independent, thorough and impartial investigation into the case.

The District Attorney does not take over the investigation. The police agency in whose jurisdiction the shooting occurred has that primary responsibility. The police agency's investigation is reviewed by the District Attorney's Officer Involved Shooting Response Team (OISRT) as is all evidence in order for the District Attorney's Office to render its final decision.

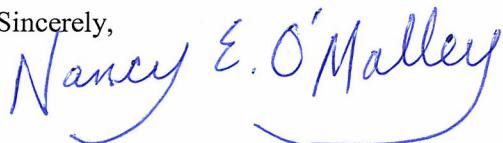
After a comprehensive review of all of the evidence gathered by and presented to the OISRT, there is one question that we, as prosecutors, must answer in the criminal law context: Can we prove beyond a reasonable doubt that the officer acted unlawfully and in violation of the law? In making that determination, we are legally and ethically mandated to evaluate whether or not the officer feared for his or her life or believed that the lives of others were at risk and if so, whether that fear was reasonable under the circumstances. The legal threshold is not whether the officer was in imminent danger, but whether the officer reasonably believed that he or she or others were in imminent danger.

As in every criminal case filed, my prosecutors also consider whether or not a jury of 12 people would convict the person of the potential charges alleged. The suspect's potential defenses must be considered in that analysis. This legal axiom protects all of our rights against unfair accusations of a crime.

There can be confusion about the District Attorney's role if the law enforcement agency finds that an officer involved shooting was out of policy or the officer used improper tactics. Acting out of policy or using improper tactics are not crimes. Those issues are sometimes determined by a civil action. The standard of proof in a civil trial is much lower than in a criminal trial. The District Attorney's Office is not making determinations about civil liability.

We know that when the use of force turns deadly, families are devastated. Family and friends are grieving and the community is in pain. That is why the District Attorney's Office must adhere to all ethical and legal standards under criminal law as we do in all cases. By doing so, we are upholding our commitment and our sworn duty to protect all members of our community.

Sincerely,



Nancy E. O'Malley  
District Attorney

# **DISTRICT ATTORNEY'S REPORT**

**OFFICER INVOLVED SHOOTING**

**OF**

**JOSHUA RYAN PAWLICK**



**NANCY E. O'MALLEY**  
**District Attorney**

**Officer Involved Shooting Team**

**March 6, 2019**

# **INVESTIGATION OF THE SHOOTING DEATH OF**

## **JOSHUA RYAN PAWLICK**

### **INTRODUCTION:**

The Alameda County District Attorney's Office has assembled an Officer Involved Shooting ("OIS") Team. The OIS Team consists of experienced Senior, Assistant, and/or Deputy District Attorneys as well as experienced District Attorney Inspectors who are sworn peace officers. The OIS Team conducts an investigation involving any death of a person caused by an officer involved shooting in Alameda County. The OIS Team is authorized by agreement with each local law enforcement agency serving Alameda County to conduct a separate, but parallel, investigation into the circumstances leading to the shooting death. The responding OIS Team in this investigation was Deputy District Attorney Tim Wagstaffe and Inspector Mark Moreno.

The OIS Team focuses exclusively on the question of whether there is sufficient evidence to prove beyond a reasonable doubt that a law enforcement official committed a crime in connection with the shooting death. The OIS Team does not examine collateral issues such as whether law enforcement officials complied with internal policies, used appropriate tactics, or any issues that may give rise to civil liability. This report should not be interpreted as expressing any opinions on non-criminal matters.

### **SCOPE OF THE INVESTIGATION:**

On March 11, 2018 shortly after 7:00 p.m., Sergeant Frank Negrete, Officer William Berger, Officer Brandon Hraiz, and Officer Craig Tanaka of the Oakland Police Department ("OPD") shot and killed Joshua Ryan Pawlik after responding to a dispatch call of a man lying on the ground with a gun in his hand on 40<sup>th</sup> Street in Oakland, California. This report documents the investigation conducted by the Alameda County District Attorney's Office.

On March 11, 2018, at approximately 8:33 p.m., the on-call OIS Team was notified that an officer involved shooting had occurred. The OIS Team responded to the incident location. The OIS Team completed a walk-through of the scene and observed evidence items. The OIS Team then proceeded to the OPD Administration Building and reviewed various materials, including video recordings.

In the early morning hours of March 12, 2018, the OIS Team participated in the interviews of Sergeant Negrete and Officer Berger. In the afternoon of the same day, the OIS Team participated in the interviews of Officer Tanaka and Officer Hraiz.

As part of its investigation, the OIS Team reviewed, among other things, police reports, dispatch communication recordings and records, evidence technician reports, diagrams, sketches, crime lab reports, photographs, and recorded statements. The OIS Team reviewed body camera

footage and forensically analyzed versions of the body camera footage. The OIS Team also reviewed the Alameda County Coroner Investigator's Report, autopsy protocol, and toxicology report relating to Mr. Pawlik.

## FACTUAL SUMMARY:

California Penal Code section 832.7(b)(5)(C)

In the late afternoon of March 11, 2018, Witness #1 saw a person laying down on his side in between two houses in the 900 block of 40<sup>th</sup> Street in Oakland. The area is residential and heavily trafficked by motorists, bicyclists, and AC Transit buses. Witness #1 was walking his dog at the time. Witness #1 noticed that the person, later determined to be Mr. Pawlik, had a gun in his hand. Witness #1 called 911 at approximately 6:17 p.m.

OPD dispatched officers to 928 - 40<sup>th</sup> Street. OPD Officer Josef Phillips arrived first. He confirmed Mr. Pawlik was on the ground and had a gun. The gun was in Mr. Pawlik's hand and pointed in the direction of 40<sup>th</sup> Street. Mr. Pawlik was located about 10 yards from the street. Though the incident occurred during daylight hours, Mr. Pawlik was in a shaded area due to being in between the two houses. OPD Sergeant Herb Webber arrived next. He noticed Mr. Pawlik was unresponsive and unaware of the police presence. Officer Phillips positioned his police car on the street in between the two houses.

Sergeant Negrete, Officer Berger, and Officer Hraiz left OPD and went to the scene. They are all members of the Tactical Operation Team. When they arrived at the scene at 6:29 p.m., they established a police perimeter. Sergeant Negrete was in charge of the Designated Arrest Team ("DAT"). Officer Berger and Officer Hraiz positioned themselves behind Officer Phillips' police car with their rifles.

Sergeant Negrete set up a plan if Mr. Pawlik woke up and was compliant. An officer would give verbal commands to him to drop the gun, stand up, and walk back to the front of Officer Phillips' police car. Officer Phillips was assigned Taser duties and later assigned to the less lethal flexible baton round shotgun (commonly known as the "beanbag" shotgun). Sergeant Negrete would give verbal commands. In order to assure sufficient cover for the officers, Sergeant Negrete decided to have the OPD "Bearcat" brought to the scene. The "Bearcat" is an armored tactical vehicle. The decision was made that once the Bearcat arrived, they would use sirens and announcements to try and wake Mr. Pawlik. If Mr. Pawlik did not respond, they would use two beanbag shotgun rounds. If Mr. Pawlik did not respond, they would try and use the Taser from the porch of 928 - 40th Street, and if Mr. Pawlik still did not respond, they would approach him with police shields. Sergeant Negrete confirmed this plan with the members on the DAT.

After about 30 minutes from the time Sergeant Negrete called for the Bearcat, Officer Tanaka arrived with the Bearcat. While waiting for the Bearcat, Sergeant Negrete, Sergeant Webber, and Sergeant Mark Rowley used binoculars to observe Mr. Pawlik. Sergeant Rowley confirmed

that Mr. Pawlik had a gun and provided a description of the gun and where it was pointed. Sergeant Rowley also took photographs of the gun and showed Mr. Pawlik's hand position on the gun to Lieutenant Yu. Officer Berger and Officer Julie Yu indicated that Mr. Pawlik was breathing. OPD officers evacuated local residences.

Officer Tanaka arrived with the Bearcat at 7:03 p.m. The Bearcat took the position of Officer Phillips' police car and parked at a 45 degree angle on the street. Officers began taking positions around the Bearcat. Officer Hraiz, armed with his patrol rifle, took a position in the turret of the Bearcat. Sergeant/Negrete, Officer Berger, and Officer Tanaka took positions on the passenger side of the Bearcat with their patrol rifles. Armed with the beanbag shotgun, Officer Phillips positioned himself behind Sergeant Negrete and Officer Berger. Sergeant Webber moved his body worn camera onto the hood of the Bearcat and directed it towards Mr. Pawlik. The video captured Mr. Pawlik before, during, and after the shooting.

As the officers set up and prepared to put their plan into action, Mr. Pawlik suddenly woke up without prompting at 7:06 p.m. Mr. Pawlik began to move his upper body, and he looked in the direction of the officers. Officers described Mr. Pawlik as having an angry or irritated expression on his face. When Mr. Pawlik began to move, the officers gave verbal commands to drop the gun. The body worn cameras from Sergeant Negrete, Officer Berger, Officer Hraiz, and Officer Tanaka did not show Mr. Pawlik wake up, but the audio captured the verbal commands. The commands were issued in English and one time in Spanish. The commands included, "Don't move," "Hands up," "Get your hand off the gun," and "Suelta la pistola (Let go of the gun)." Officer Julie Yu gave one verbal command via the public address system in one of the police vehicles. The officers gave approximately 12 verbal commands in English and one in Spanish. The verbal commands issued to Mr. Pawlik lasted about 37 seconds.

During the verbal commands Mr. Pawlik began to sit up and grasped the gun with his right hand. Sergeant Negrete, Officer Berger, Officer Hraiz, and Officer Tanaka asserted that Mr. Pawlik raised his gun in their direction, and they feared for their lives and the lives of others. They believed that Mr. Pawlik was going to shoot at them or surrounding officers. The body worn camera footage showed the officers firing their weapons almost simultaneously.

Officer Hraiz fired five rounds from his rifle. Officer Berger fired six rounds from his rifle. Sergeant Negrete fired seven rounds from his rifle. Officer Tanaka fired four rounds from his rifle. Officer Phillips fired one beanbag round from the shotgun. The rounds struck Mr. Pawlik multiple times, and he fell backwards.

An arrest team approached Mr. Pawlik and handcuffed him. Officers secured Mr. Pawlik's gun and determined it was loaded. It was a .22 caliber Smith and Wesson semi-automatic pistol. Officer Yu and medical personnel attempted first aid, but Mr. Pawlik died at the scene.

Officers located drugs, drug paraphernalia such as a syringe and a lighter, and large denominations of cash around Mr. Pawlik's body and inside his belongings. Officers located several bags near Mr. Pawlik's body. Officers found over \$100,000 in cash and 144 live rounds of ammunition in his property.

Officers canvassed the area around the scene and interviewed numerous people. Several witnesses described hearing verbal commands and gunshots, but no civilian witnesses saw Mr. Pawlik at the time of the shooting.

Around 7:48 p.m. that night, OPD Officer Jean Ahuncain assisted in processing the scene and documenting the evidence. Officer Ahuncain and three OPD crime scene technicians processed the scene with a "Total Station" crime scene mapping tool. Officer Ahuncain recovered Mr. Pawlik's pistol and one live round. Near the area of the Bearcat's position during the incident, officers located 24 cartridge casings and one shell from a shotgun.

Officer Ahuncain processed three bags found near Mr. Pawlik's body. The bags contained indicia in Mr. Pawlik's name. Officer Ahuncain found a total of 144 live rounds of ammunition, approximately \$120,000 in cash, an electric scale, drug paraphernalia, and pepper spray. Officer Ahuncain recovered a needle plunger and two plastic bags with chunks of a white substance around the area of Mr. Pawlik's body.

The OPD Crime Lab analyzed all four rifles. Sergeant Negrete's rifle was a Noveske Model N4, 5.56x45mm caliber semi-automatic rifle with a magazine and 23 5.56x45mm cartridges. The magazine had a capacity of 30 cartridges. Officer Jean Ahuncain did a round count with Sergeant Negrete.

Officer Berger's rifle was a Colt Model M4 Carbine, 5.56x45mm caliber semi-automatic rifle with a magazine and 22 5.56x45mm cartridges. The magazine had a capacity of 30 cartridges. Officer Jean Ahuncain did a round count with Officer Berger.

Officer Tanaka's rifle was a Colt Model M4 Carbine, 5.56x45mm caliber semi-automatic rifle with a magazine and 26 5.56x45mm cartridges. The magazine had a capacity of 30 cartridges. Officer Jean Ahuncain did a round count with Officer Tanaka.

Officer Hraiz's rifle was a Colt Model M4 Carbine, 5.56x45mm caliber semi-automatic rifle with a magazine and 25 5.56x45mm cartridges. The magazine has a capacity of 30 cartridges. Officer Jean Ahuncain did a round count with Officer Hraiz.

The OPD Criminalistics Division later test fired all four rifles and found them to be in working order. Testing on Mr. Pawlik's pistol revealed it to be in working order.

The OPD Criminalistics Division processed and examined Mr. Pawlik's pistol for fingerprints. The print examiner was unable to obtain any latent prints of value.

The OPD Criminalistics Division examined Mr. Pawlik's pistol and the syringe needle found near his body for biological material and DNA typing. Mr. Pawlik's DNA was on the needle of the syringe, the pistol grip, and the pistol trigger.

The OPD Criminalistics Division Laboratory examined various narcotic items found in Mr. Pawlik's property and near his body. The lab found substances that tested positive for fentanyl, cocaine hydrochloride, tramadol, cocaine base, alprazolam and heroin.

The Oakland Police Department finalized the Investigative Action Report on October 31, 2018.

### **VIDEO EVIDENCE:**

The OIS Team reviewed all available video evidence items as part of its investigation. These items included footage captured by OPD body worn cameras, surveillance video from two addresses near the incident location and video from AC Transit.

Additionally, the OIS Team reviewed video analysis of Sergeant Webber's body worn camera that was on the hood of the Bearcat during the incident. First, the Alameda County District Attorney's Office Video Unit prepared a frame-by-frame analysis of the footage. Second, OPD video analyst Sergeant Ramirez prepared a body worn camera analysis of Sergeant Webber's body camera footage. Finally, the City of Oakland hired two outside companies, Imaging Forensics and Precision Simulations, to enhance and analyze the footage.

The OIS Team reviewed body worn camera footage from 34 officers. Although numerous cameras were recording at the time of the incident, Sergeant Webber's camera that was placed on the hood of the Bearcat is the only footage that visually captured Mr. Pawlik's position at the time of the shooting. The camera views of the other officers during the shooting were either blocked views of Mr. Pawlik or not in his direction, although several of these other videos captured pertinent audio. The examination of these audio recordings established that the audio evidence was consistent with the statements of the officers.

On Sergeant Negrete's body worn camera footage, the Bearcat engine audibly turns off. At the 37:25 time stamp on the video player on Sergeant Negrete's body worn camera, officers start to give commands to Mr. Pawlik not to move, put his hands up, and take his hand off the gun. At 37:36, Sergeant Negrete continued to give verbal commands, yelling, "Hey, do not move. Get your hand off that gun young man. Get your hand off the gun." At 37:48, Sergeant Negrete can be heard saying, "Get your hand off the gun." At 37:51, Officer Julie Yu gave a verbal command from the public address microphone. At 37:53, Officer Berger gave a verbal command to drop the gun in Spanish.

Officer Phillips, armed with the beanbag shotgun, then stated, "Let me know when you want me to tag him Sergeant." At 38:01, Officer Berger replied if the gun moved, "bag him." Officer Phillips body worn camera showed that he was positioned behind Officer Berger.

At 38:11, Sergeant Negrete gave another verbal command, "Get your hand off the gun." Sergeant Negrete then began to give another verbal command in a more panicked and rapid voice. He stated, "Get your hand...," but rapid gunfire interrupted the command.

At 38:16, Sergeant Negrete stated, "Stand by. Stand by." At 38:30, Sergeant Negrete verbally checked on all the officers, and at 38:56 Sergeant Negrete advised that the gun was away from Mr. Pawlik and a team set up to approach him. At 39:19, Sergeant Negrete told the approaching officers to kick the gun back.

At 39:42, Sergeant Negrete requested a medical response and first aid to start immediately.

At 39:52, Sergeant Negrete can be heard stating, "God dang it dude. Dude, we had to; he pointed the gun right at us man. God dang it."

The OIS Team, OPD investigators, an OPD video expert, and two outside agencies reviewed and analyzed the footage from Sergeant Webber's body worn camera placed on the hood of the Bearcat. At first, the body camera video footage from the hood of the Bearcat depicts Mr. Pawlik lying on the ground in between the two houses, but it is grainy because of Mr. Pawlik's distance from the camera. It is impossible to see if there is anything in his hand. Shortly after the officers turned off the Bearcat engine, Mr. Pawlik woke up. He appeared to look in the officers' direction. After a couple of seconds, Mr. Pawlik further sat up while continuing to look towards the officers. Mr. Pawlik maintained a "half sit-up" position for approximately 42 seconds. During this time, Mr. Pawlik moved his head and appears to look around, but the rest of his body has minimal, if any, movement. The area where he would have been holding the gun does not move during this 42 second time period. The officers can be heard loudly yelling various commands to drop the gun. Shortly before the officers fired, the right side of Mr. Pawlik's body, particularly in the area of his right shoulder, appears to raise up. The video is too grainy to determine if Mr. Pawlik raised his pistol off the ground.

OPD Sergeant Ramirez analyzed the footage from Sergeant Webber's body worn camera on the hood of the Bearcat. Based on his analysis of the video footage, he concluded Mr. Pawlik was lying on his back in a supine position with his right hand palm up with a gun in his hand. Mr. Pawlik started to move as the Bearcat moved into place. Mr. Pawlik lifted his head and torso towards the street where the officers were located on the street. When the shooting occurred, Mr. Pawlik appears to be moving into a sitting position. The resolution of the video and distance from Mr. Pawlik did not allow for a clear view of Mr. Pawlik's right hand movement or movement of the gun. Sergeant Ramirez analyzed the "contrasting areas," and this analysis supported a conclusion that there was movement in an upward direction in the area of Mr. Pawlik's right hand before the shooting.

The OIS Team reviewed the Precision Simulations analysis of Sergeant Webber's body camera on the hood of the Bearcat. Precision Simulations provided a frame-by-frame PowerPoint and three enhanced videos. One of the videos was enhanced with no zoom. A second video was enhanced with no zoom but in slow motion. The third video was enhanced with zoom. Precision Simulations did not include any type of report or conclusions about the footage.

The OIS Team reviewed the Imaging Forensics analysis of Sergeant Webber's body worn camera on the hood of the Bearcat and several other body worn camera videos. George Reis of Imaging Forensics provides forensic photography, video analysis, and photographic analysis through his business, Imaging Forensics, Inc. He also provides training in these disciplines, primarily to police and government agencies. He has over 25 years of experience in this field, including 15 years at the Newport Beach Police Department. He has provided training to the US Secret Service, FBI, US Army Crime Lab, and other federal, state, and local police departments throughout the US and Canada. He is certified by the Law Enforcement and Emergency Services Video Association (LEVA) as a Forensic Video Analyst, and in Forensic Photography and Imaging by the International Association for Identification. Since 1995, he has worked

hundreds of cases and testified more than 60 times in court and depositions in criminal and civil cases.

Imaging Forensics initially provided OPD with a clarified version of one of the videos in August, 2018. Imaging Forensics enlarged the video and adjusted the contrast and brightness levels to show detail. The method used for the enlargement was bi-linear, which retains a large amount of the natural shape of objects when enlarging, to prevent pixilation. Imaging Forensics also included a frame-by-frame PDF file of the video. There are 743 frames.

OPD further retained Imaging Forensics to analyze the videos to determine four things: 1) if the male adult is in possession of a firearm; 2) the body movement of the male adult in the 30 second period prior to the firearm discharges, especially any movement of his right hand; 3) the movement of the male adult's right hand in relation to each firearm discharge; and 4) the chronology of the firearm discharges to include the total time from the first firearm discharge to the last firearm discharge.

Imaging Forensics' answered those four questions as follows:

- 1) Is the male adult in possession of a firearm?

Due to the resolution, compression, lighting, distance from camera, and angle of view, this could not be discerned from an analysis of this video.

- 2) The body movement of the male adult in the 30 second period prior to the firearm discharges, especially on any movement of his right hand.

Because of the resolution, compression, low contrast light, distance from camera and the angle of view, small, subtle movements cannot be discerned. The right hand is not visible in the video prior to the shots being fired. There is some movement of the subject's head, and possibly his left arm and hand as well as his right arm during the 30 seconds prior to the first shot. In addition, the subject's feet move several times during the 30 seconds prior to the first shot.

- 3) The movement of the male adult's right hand in relation to each firearm discharge.

There are two factors that limit the ability to make this analysis. First, due to the factors listed above, it is not possible to discern the exact position of the subject's right hand prior to the first shots. In addition to this, there are limitations regarding the audio recording that make it impossible to determine the exact number of shots fired, or their exact timing (see number 4, below). It is possible, however, to see some movement of the right arm during the time that the shots are being fired.

- 4) The chronology of the firearm discharges to include the total time from the first firearm discharge to the last firearm discharge.

Many audio recorders, including body worn cameras, use Automatic Levels Control or Audio Gain Control which can result in the inability to record the separate, individual shots fired.

Imaging Forensics compared the audio files and the audio file spectrum in each of the body worn cameras that recorded this event and found them all consistent with each other, but all likely do not record each individual shot that was fired. It is likely, however, that the first shot was recorded correctly, and that the last shot was recorded correctly, or very close to it (within a frame or two). There are approximately 12 shots that can be discerned – but it is possible that the recording equipment did not record all firearm discharges. The files provided to Imaging Forensics begin 30 seconds prior to the first shot, and show that the duration of the shots was two seconds and seven frames (at 30 frames per second, this is 2.23 seconds, or approximately two and a quarter seconds.)

#### Imaging Forensics' Conclusion

Because of the low resolution, compression, distance from camera, lighting, and angle of view, discerning if the male adult is in possession of a firearm is not possible. The position of the right hand during the 30 seconds prior to the first shot is not possible for the same reasons, however, it is possible to see his head movement, some movement of his right arm just prior to the first shot, his overall body position, and some movement of his feet, and possibly his left arm and hand. The exact number of shots fired, and their exact timing cannot be determined, as microphones often have an automatic gain (levels) control that could prevent two or more shots in rapid succession from each being recorded. The total duration of the shots was approximately 2.23 seconds.

#### **LAW ENFORCEMENT WITNESS STATEMENTS:**

##### Oakland Police Sergeant Francisco Negrete

On March 12, 2018 at 1:17 a.m. Sergeant Francisco "Frank" Negrete was interviewed. Attorney Zachery Lopes from Raines, Lucia and Stern represented Sergeant Negrete. Sergeant Rich Vass, Sergeant Leo Sanchez, Homicide Lieutenant Randy Brandwood, Criminal Investigation Captain Roland Holmgren, and Officer Hector Jimenez were present from OPD. Deputy District Attorney Timothy Wagstaffe and Inspector Mark Moreno were present from the District Attorney's Office.

Sergeant Negrete was advised that this was a voluntary statement and he could terminate the interview at any time.

Sergeant Negrete has been an officer with OPD since November of 2008. On March 11, 2018, Sergeant Negrete was assigned as the supervisor of Crime Reduction Team 1 (CRT1). He began his shift at 10:00 a.m.

OPD Dispatch advised that a person with a gun was down between two homes located at 928 - 40<sup>th</sup> Street. Sergeant Negrete said once the initial officer arrived on scene an update was given that, "a man appeared to be passed out with a gun in his hand." Officer Berger, Officer Hraiz, and Sergeant Negrete responded to the scene inside of Sergeant Negrete's patrol car.

On the way to the scene, Sergeant Negrete advised dispatch that all three officers were in route and all three officers had rifles. As a member of the Tactical Operations Team, Sergeant Negrete has a rifle assigned to him. The rifle is a Noveske Rifleworks, 5.56, Model N4.

Once Sergeant Negrete arrived on scene he noticed that Officer Phillips and Sergeant Webber were taking cover behind an OPD Ford Explorer that was in front of the location. Sergeant Webber showed Sergeant Negrete where Mr. Pawlik was located. Sergeant Negrete could not tell if Mr. Pawlik was sleeping or deceased, but he said, "I could clearly see that there was what appeared to be a semi-automatic pistol lying in his right hand." Sergeant Negrete said that Mr. Pawlik was in between two houses that were approximately 10 feet apart from each other. "It was daylight, well lit." The grass between the houses was neatly manicured and the officers on the scene had a clear view of Mr. Pawlik's body and the pistol. They could not see Mr. Pawlik's left hand because it was behind him.

Sergeant Negrete began giving orders to officers on the scene. Sergeant Negrete requested more officers, and he began setting up a DAT. Sergeant Negrete said he provided instructions to the officers on the DAT. Sergeant Negrete said he covered contingent plans if Mr. Pawlik woke up. Sergeant Negrete also said the main goal was to get Mr. Pawlik into custody without using any force.

The officers assigned to the DAT were Sergeant Webber and Officer Phillips. Officers Berger and Hraiz were designated riflemen and were assigned as cover.

Sergeant Negrete requested the presence of the OPD Bearcat. The Bearcat (armored vehicle) is stored at the OPD Eastmont Police Substation on 73<sup>rd</sup> Avenue in Oakland. Sergeant Negrete asked Officer Tanaka to retrieve the Bearcat and bring it to the scene.

Sergeant Negrete stated that he wanted to slow "everything else down and I wanted to make sure that everyone was on the same page of what we were doing." Sergeant Negrete said his main concern was the safety of the surrounding community. Sergeant Negrete described the surrounding area as "densely populated."

Sergeant Negrete had officers go one block north of the incident and set up a perimeter in the event Mr. Pawlik woke up and fled on foot. Sergeant Negrete wanted to contain Mr. Pawlik to make sure he did not hurt anyone. Once the perimeter was set, Sergeant Negrete updated Lieutenant Yu, the incident commander. Lieutenant Yu assigned Sergeant Negrete as the supervisor of the DAT. Sergeant Negrete said he provided everyone with their task once the DAT was established.

Sergeant Negrete also told members of the DAT if Mr. Pawlik woke up prior to the Bearcat arrival, the arrest team would stay behind cover, give verbal commands to Mr. Pawlik, and direct Mr. Pawlik to walk back to the front right portion of the Police Explorer. When the Bearcat

arrived on scene they would keep the same plan, but they would use the Code 3 siren to wake Mr. Pawlik up and then make announcements so they could have Mr. Pawlik surrender.

If Mr. Pawlik did not wake up after several attempts with the siren, Sergeant Negrete provided a secondary plan to wake Mr. Pawlik up by deploying bean bag rounds to Mr. Pawlik's shin area. Sergeant Negrete said that Mr. Pawlik's arms were not an option for the bean bags because they were too close to his head region.

If the secondary plan did not work the next step would be to use a Taser to try and wake Mr. Pawlik up and then surrender. If Mr. Pawlik did not wake up at that point, Sergeant Negrete said they would consider Mr. Pawlik so incapacitated that he was not a threat. Sergeant Negrete said only then would they try to take the gun from Mr. Pawlik.

Sergeant Negrete considered a K-9, but his fear was that the K-9 would immediately bite Mr. Pawlik and "latch on to him." Sergeant Negrete thought that may cause Mr. Pawlik to use the firearm against the dog or the officers on the scene. This would put people in the surrounding area, police officers, and himself in danger. Sergeant Negrete said the goal from the beginning was to take Mr. Pawlik into custody without using force, "I felt the K-9 would have prompted him to start shooting."

Sergeant Negrete said one officer made the suggestion to go up and step on the gun. Sergeant Negrete did not think that was an option because it was not safe. Sergeant Negrete stated, "It takes somebody a split second for them to grasp the gun and bring it up to use it...and kill myself hurt myself or our officers... right. There is no reason to do that. It's not safe. The safest thing is to have him... get up... and walk towards us with his hands up. Safest for him... it's safest for us and everyone else in the area and that is why we went with the plan we did. We didn't want to close the distance between him... Within the max effective range of a firearm... It's just not... the safest way to do it."

Sergeant Negrete did not want to wake Mr. Pawlik up until the Bearcat was on scene because the Bearcat offered the most protection. Sergeant Negrete felt there was no need to wake Mr. Pawlik up until they were ready to take Mr. Pawlik into custody. Sergeant Negrete felt the plan that was set up was the one that offered the greatest amount of success to take Mr. Pawlik into custody.

Sergeant Negrete estimated it took the Bearcat 30 or 40 minutes to get to the scene. Sergeant Negrete said they had a plan if Mr. Pawlik woke up before the Bearcat's arrival. Besides waiting for the Bearcat, Sergeant Negrete said that plan was to "challenge him, tell him not to get the gun, drop the gun, for our commands... Walk him back to us at the front right portion of the Explorer... take him into custody. I also designated who had... Herb [Sergeant Webber] had to do less than lethal bean bags, Phillips was Taser and I was going to handcuff. I had Officer Hraiz and Officer Berger as lethal cover." Commands were not given to Mr. Pawlik before the Bearcat arrived because they did not have "any armor." Sergeant Negrete said having an armored vehicle was a "must" for the protection of the officers.

The Bearcat arrived on scene, and they simultaneously moved the Ford Explorer westbound and moved the Bearcat into position. When the Bearcat arrived Officer Phillips and Sergeant Webber switched assignments because Lieutenant Yu did not want Sergeant Webber to have the beanbag shotgun. Sergeant Phillips was assigned to the beanbag shotgun and Sergeant Webber to the Taser.

Sergeant Negrete estimated that he was about 25 feet away from Mr. Pawlik. Officer Berger used binoculars to evaluate Mr. Pawlik. Sergeant Negrete said they did not see any signs of suicide. Sergeant Negrete also looked at the firearm and thought it looked real and thought it looked like a 9mm or 40 caliber. The only time the gun was not in Mr. Pawlik's hand was after the use of force.

Mr. Pawlik woke up as the officers were getting set up with the Bearcat. Sergeant Negrete said Mr. Pawlik sat up and started looking in the direction of the officers. Sergeant Negrete immediately started to give Mr. Pawlik commands. Sergeant Negrete said he gave Mr. Pawlik several loud commands, but Mr. Pawlik did not obey the commands. Sergeant Negrete said he started to consider less lethal options, but the incident evolved so quickly that the officers did not have time for those options. Sergeant Negrete said he commanded Mr. Pawlik, "Don't move, don't reach for the gun.... Right... I said several times and that's when he started lifting it up." Sergeant Negrete didn't think any other officers on scene were giving commands.

Sergeant Negrete said Mr. Pawlik was lying on the right side of his back, legs bent, right arm out in front of him with the gun directly on his hand and left arm behind him. When Mr. Pawlik sat up, the gun was still in his hand when he looked at the officers. Mr. Pawlik looked in their direction a couple of times then looked to his right. Sergeant Negrete said the gun was facing the officers and Mr. Pawlik grasped the gun and then began raising the gun. Sergeant Negrete demonstrated how Mr. Pawlik grasped the gun and raised it up in the officers' direction. Sergeant Negrete raised his hand about six to eight inches off the table. Then Sergeant Negrete said, "At that point... I... I mean I was... I was afraid he was going to kill us... or my officers on scene. So... that was the point where I had to, you know, I had to use lethal force."

Sergeant Negrete said that Mr. Pawlik looked to his right and also looked in the officers' direction. Sergeant Negrete saw Mr. Pawlik grasp the gun with his right hand and Sergeant Negrete said, "[His gun] was pointed in our direction, not directly at us but in our direction of all of us at the armored vehicle and he began to raise the firearm towards us." Sergeant Negrete said he gave direct and clear commands. Mr. Pawlik never said anything, and Sergeant Negrete did not think Mr. Pawlik understood his commands because he did not obey them.

Sergeant Negrete thought Mr. Pawlik was either going to kill him, kill one of his officers on scene, or hurt a civilian. Sergeant Negrete said he was fearful for his life, his fellow officers' lives, and other people in the area. Sergeant Negrete said he made the decision to use lethal force "to stop that from happening." Sergeant Negrete said at the time of the shooting he did not

hear anything because all sounds "went completely muffled." Sergeant Negrete said as he pulled the trigger he thought someone else fired at almost the same time he did. He thought he fired "at least three, no more than five" rounds.

Sergeant Negrete described the cadence of the rounds he fired as three to five rounds in one second. Sergeant Negrete said he had both eyes open looking through the optic and the red dot was on Mr. Pawlik. Sergeant Negrete said his patrol rifle had a M64 single red dot optic. The scope does not provide magnification.

After lethal force was used, Mr. Pawlik fell backwards. Sergeant Negrete stopped firing when he saw the gun was separated from Mr. Pawlik due to the shooting. Sergeant Negrete said at that point he felt it was okay to approach Mr. Pawlik.

Sergeant Negrete instructed Sergeant Webber to get the protective shield. A team of officers approached Mr. Pawlik, secured him in handcuffs, and Sergeant Webber secured the gun. Once the scene was secure, Sergeant Negrete said he directed officers to give first aid to Mr. Pawlik. Medical personnel were staged nearby and called in immediately.

When the officers were securing Mr. Pawlik they turned him over and Sergeant Negrete said he saw powder cocaine or possibly methamphetamine inside a plastic baggie in his clothing. Sergeant Negrete did not inspect the possible drugs because his concern at that point was getting Mr. Pawlik medical treatment.

During the interview, Sergeant Negrete discussed some of the strategic elements of the incident.

Sergeant Negrete talked about whether the incident was rushed. Sergeant Negrete stated "Our whole goal for this was never to rush, it was to get him in custody. You can't rush it when you have a vehicle coming from the other side of town. We did not dictate the pace of this or the outcome, it was done by the gentleman who had the gun in his hand. Initially the DAT was set up quickly... then slow everything else down. At no point did I want to rush this at all. There was no reason to rush it... my thinking was if this is rushed one of my officers might get hurt, someone from the public may get hurt, I may get hurt."

Sergeant Negrete was asked about just staying behind the armored car. Sergeant Negrete stated, "Yeah we could have... But then the other problem with that is we still have Officer Hraiz in the turret...we still have rounds being fired at us..., people aren't always accurate with their rounds, bullets don't just stop once they leave the barrel, they're going to go through whatever they go through. If he flees into a house next door then we have a completely different situation where we have other people from the public now who are at great risk of being harmed or killed."

Sergeant Negrete said if Mr. Pawlik would have obeyed commands and put the gun down "he would have been told to stand up, our general operating orders as far as taking somebody into custody. Hands up, 360, turn around. Ok walk back towards us. We would have handcuffed him

from a position of cover. Then we would have called medical for him and make sure he's okay and if he had a psychiatric problem we had a CIT officer there that would have helped him out. Then that would have been the end of it. But... It just didn't work out that way."

Sergeant Negrete said he wanted to have a plan in place before officers on the scene took Mr. Pawlik into custody. Sergeant Negrete stated, "so sometimes officers who are not... experienced... we have a very young department... even though we are trained in this, I wanted to make sure we are set up for success... as far as taking him into custody... right... myself and my guys who work for me have a lot of experience in stressful situations... sometimes people want to go too fast...right... and there is no reason to with this kind of incident...right... if he's passed out or he's not awake or just... there's no reason to rush in there. I wanted them to wait until we got there. There were only two people on scene and that's not a safe thing to do for them or anyone else in the area."

Sergeant Negrete explained what the difference was between beanbag shotgun round to the leg and a K-9. Sergeant Negrete said that he felt that the beanbag shotgun round would be more effective because once it struck Mr. Pawlik it would likely hurt him for a second and wake him up. "You don't have an animal that is up to 75 pounds chomping on your arm or leg... pulling you. My thing is your natural reaction is either going to be a fight or flight. If he fights it could be bad for everybody there. If it's a flight he's not going to get very far... he's going to have a dog on him but I think the natural reaction is to fight and if you have a gun on you it's going to be even more of a natural reaction to shoot the dog or start shooting in the area."

Sergeant Negrete was asked the difference between people waking up normally compared to the way Mr. Pawlik woke up. Sergeant Negrete stated, "that's the whole thing... when you are saying normally... for me this is not normal, having someone in between two houses with a gun in his hand is not normal to me. Having someone who is given clear directions and doesn't obey them with a gun in their hand... We have a bunch of officers who are pointing firearms back at you is not normal... So at that point I'm not left with too many choices..." He was asked if there were any other choices and Sergeant Negrete stated, "absolutely not ... It's not a choice... that I want to make... but it was a choice that I was forced to do for the safety of myself, my officers, and everyone else in the area." He was asked if he ordered other officers to use lethal force and he stated, "Absolutely not."

Sergeant Negrete said that he shot more than once because "he was still a threat until I could determine he was no longer a threat." Sergeant Negrete did not have time to think between shots. He said he stopped shooting when "he is laid back...backwards on his back, he was turned and the gun was separated from him. So at that point I did not feel he was a lethal threat to us anymore or immediate threat so I immediately de-escalated the force."

At the conclusion of the initial interview, Sergeant Negrete had the opportunity to review his body worn camera footage. The interview resumed with no further substantive questioning and concluded at 2:39 a.m.

#### Sergeant Negrete Second Interview

On August 10, 2018, OPD conducted a second interview with Sergeant Negrete. The OIS Team was not notified of this interview in advance and was not given an opportunity to participate. OPD later provided a recording of the interview for review by the OIS Team. Sergeant Vass, Acting Lieutenant Brad Baker, and Captain Holmgren were present from OPD. Sergeant Negrete was represented by Zachery Lopes from Raines, Lucia and Stern. Sergeant Sanchez video recorded the interview. The following is a summary of the interview.

Captain Holmgren advised that they had time to review the factors of the case and they had some follow-up questions. Captain Holmgren also mentioned that Sergeant Negrete was given the opportunity to review some phone data records from his work cellular phone.

Sergeant Negrete advised that he did not have prior contacts with Mr. Pawlik. Sergeant Negrete said that the only topics of conversation with Officers Berger and Hraiz on the way to the scene were the fastest way to the scene, the officers on scene, and the time of day. Sergeant Negrete confirmed he was the supervisor of the DAT and Sergeant Webber was on scene to assist.

Sergeant Negrete had his rifle with him, but he did not designate himself as lethal cover. Officers Berger and Hraiz were the only ones designated as lethal cover. When the movement of the police vehicles did not go as planned, Sergeant Negrete's roll changed to lethal because the officers were not completely set up and Mr. Pawlik became active. In essence, the SUV was moved before the Bearcat was in place. Sergeant Negrete said when he had to use lethal force he felt his life was in danger. He described the barrel of Mr. Pawlik's gun pointing at him, and he felt like he needed to react and defend himself.

When Officer Tanaka arrived with the Bearcat, Sergeant Negrete gave him direction on where to park. Officer Tanaka was described as a utility officer to the DAT, and he would have replaced Sergeant Negrete's position, but Mr. Pawlik woke up. Sergeant Negrete did not know that Officer Tanaka was outside the Bearcat until he felt casings hit his face and he saw the casings hit his rifle. Sergeant Negrete assumed the casings came from Officer Tanaka because Officer Hraiz was inside the turret.

Sergeant Negrete did not recall using his work or personal cellular phone prior or during the shooting. Sergeant Negrete used his personal cell to call his wife. He told his wife he was involved in an officer involved shooting and not to wait up for him. Sergeant Negrete also called two other officers who weren't involved in the incident and could stand by with him as peer support.

Oakland Police Officer William Berger

On March 12, 2018 at 2:55 a.m. Officer William Berger was interviewed. Zachery Lopes from Raines, Lucia and Stern represented Officer Berger. Sergeant Rich Vass, Sergeant Leo Sanchez, Homicide Lieutenant Randy Brandwood, Criminal Investigation Captain Roland Holmgren, and Officer Hector Jimenez were present from OPD. Deputy District Attorney Timothy Wagstaffe and Inspector Mark Moreno were present from the District Attorney's Office.

Officer Berger was advised that this was a voluntary statement and he could terminate the interview at any time.

Officer Berger has been a police officer with OPD since July 2014. On March 11, 2018, Officer Berger was assigned to Crime Reduction Team 1. Officer Berger has been assigned to the Crime Reduction Team unit for two years. Officer Berger described the Crime Reduction Team's responsibilities as a proactive gang, gun(s), violent crime(s) and drug enforcement unit in the area of West Oakland.

He began his shift at 12:00 p.m. On the evening of March 11, 2018, Officer Berger was at the Police Administration Building with Sergeant Negrete and Officer Hraiz.

Officer Berger said Officer Phillips' put out call details in regard to a man down in the street, armed with a gun. Officer Berger and Officer Hraiz drove to the scene with Sergeant Negrete. Officer Berger and Officer Hraiz are Patrol Rifle Officers.

Upon arrival Officer Berger saw Officer Phillips with Sergeant Webber "behind their patrol car." He also noted scene security and perimeter units. Once on the scene Officer Berger recalled a DAT being set up. Initially Officer Berger was behind a patrol vehicle but then he quickly moved behind a silver pick-up truck and used that as cover. Officer Berger is familiar with this area of Oakland and is currently assigned to this sector. Officer Berger described the area as a residential area that is heavily populated. He also mentioned that it is frequented by bicyclists.

Officer Berger said he was assigned the role as "primary cover," Sergeant Negrete was assigned to "talker, cuffer," Sergeant Webber was "less lethal initially."

Officer Berger said that the officers on scene talked about "contingency plans" if Mr. Pawlik woke up. The officers tried to determine if Mr. Pawlik was moving, if he still had a gun, and if Mr. Pawlik was alive. The contingency plans were discussed multiple times because officers were arriving on scene and officers were moving from one position to another. Officer Berger said some of those contingency plans included accepting surrender and preventing escape if Mr. Pawlik tried to run.

Officer Phillips advised that he saw the gun in Mr. Pawlik's right hand and the barrel was pointing southeast. Officer Berger said the gun was not pointed directly at them but "very close at an angle." Mr. Pawlik's right hand was on the gun. Officer Berger said he was looking for

the rise and fall of Mr. Pawlik's chest, swallowing, nostrils flaring, and if he was breathing or conscious. Officer Berger said that his role as a primary cover was to cover Mr. Pawlik. Officer Berger said he saw Mr. Pawlik swallow and signs of breathing. Officer Berger said he advised officers around him.

Officer Berger said the officers discussed contingency plans. The discussion included where they were going to handcuff Mr. Pawlik if he woke up and was compliant. If that was the case Sergeant Negrete would "address him, bring him to a position of disadvantage, handcuff behind cover behind the patrol car." Officer Berger said that he would maintain primary cover. Officer Phillips took over the beanbag shotgun from Sergeant Webber. If Mr. Pawlik was not compliant the officers discussed using the beanbag shotgun.

Officer Berger said that at one point he saw the gun in Mr. Pawlik's hand move slightly so he updated the officers on scene via his police radio. He wanted to make sure officers knew Mr. Pawlik was moving.

Officer Berger said he heard Sergeant Negrete ask for the Bearcat. Officer Berger knew that Officer Tanaka was in charge of bringing the Bearcat to the scene from the OPD Eastmont Police Substation. The officers stayed in position. They wanted to wait for the Bearcat before the plan started. Officer Berger stated he did not feel they had a safe position without the Bearcat. Officer Berger said Mr. Pawlik's hand was on the gun so he thought they should utilize the armor of the Bearcat because it would give them more space to work safely. Officer Berger did not think the rear of the patrol car was sufficient cover. Officer Berger said that they were going to wait because time was on their side. Officer Berger estimated that it took the Bearcat 15 minutes to arrive.

Once the Bearcat arrived, they replaced the patrol car with the Bearcat. Officer Berger was stationed behind the front passenger side fender. Officer Berger stated that Mr. Pawlik sat up a minute or two after the Bearcat arrived. Mr. Pawlik sat up and looked at the officers. As soon as he moved, the officers started addressing him and giving him commands.

Officer Berger said that he told Officer Phillips "If this guy moves without the gun just bag him... means like hit him with the beanbag gun." Officer Berger said that "bag him" is a phrase officers use and it means to deploy the bean bag on a person. In essence it is a force option officers use before deadly force when a person isn't being compliant. Officer Berger did not remember if Officer Phillips responded.

After Mr. Pawlik woke up, his hand with the gun did not move at first. His hand was "just kind of on the gun." Mr. Pawlik started to sit up, and he came forward more towards a fully seated upright position. Officer Berger saw his hand come up and the barrel of the gun pointed straight at Officer Berger. Officer Berger said the gun moved 12 to 14 inches off the ground. Officer Berger started shooting to protect himself and everybody on his team. Officer Berger continued shooting until he felt Mr. Pawlik was no longer a threat. Officer Berger said his concern when

he saw Mr. Pawlik pointing a gun in his direction was that he was going to die. Officer Berger thought Mr. Pawlik had enough time to obey the commands that were being given. Officer Berger said it took about one and a half seconds to fire the five rounds. Officer Berger did not have time to think in between the rounds being fired and Officer Berger stopped shooting when he saw the gun fall out of Mr. Pawlik's hand. Officer Berger said there was an alley way and a small shed behind Mr. Pawlik. He said he was aiming at Mr. Pawlik's torso. Officer Berger described the cadence of the rounds he fired as quick. Officer Berger could also tell that Sergeant Negrete was firing because he could see his casings. Officer Berger did not know who fired first.

When Mr. Pawlik was raising his arm with the gun in it, Officer Berger thought the intent was to shoot him. When the gun was pointed at Officer Berger, he thought if he did not use force at that moment, something bad was going to happen to him or the person next to him.

Officer Berger said that Mr. Pawlik was in between the two houses about 10 or 15 yards away from the sidewalk. Sergeant Vass asked Officer Berger if Mr. Pawlik would be able to see the marked patrol vehicle from where he was, and Officer Berger responded, "Absolutely." Officer Berger described the width of the alley way as "eight feet or so."

Officer Berger said that the officers on scene discussed the contingency plans. Officer Berger was assigned as primary cover. Sergeant Webber was less lethal, then that assignment later changed to Officer Phillips. Sergeant Negrete would give commands if Mr. Pawlik woke up.

Officer Berger did not know why Mr. Pawlik sat up. He said commands were not being given at the time he sat up. Officer Berger described Mr. Pawlik's irritated look. Officer Berger stated Mr. Pawlik looked confused and angry that the officers were there.

Officer Berger explained when Mr. Pawlik sat up and saw the officers he then started to fall backwards and verbal commands were being given. They also tried giving the commands in Spanish. Mr. Pawlik did not acknowledge the Spanish commands. Officer Berger also explained that when Mr. Pawlik sat up all the way, he could see the gun in Mr. Pawlik's hand and the gun started to come up off the ground and point at the officers. Officer Berger was afraid that Mr. Pawlik was going to shoot, harm or kill him. Officer Berger was focused on the gun and not on Mr. Pawlik's face when the gun was being raised because that was the means Mr. Pawlik had to cause him harm.

Officer Berger gave one verbal command in Spanish and that was the only command he gave.

Officer Berger saw drug paraphernalia and "a lot of money" in his property, on Mr. Pawlik's person, and around the area Mr. Pawlik was lying.

At the conclusion of the interview, Officer Berger had the opportunity to review his body worn camera footage. The interview resumed with no further substantive questioning and concluded at 4:10 a.m.

Oakland Police Officer Craig Tanaka

On March 12, 2018 at 3:05 p.m., Officer Craig Tanaka was interviewed. Don Nobles from Raines, Lucia and Stern represented Officer Tanaka. Oakland PD personnel also present were Sergeant Rich Vass, Sergeant Leo Sanchez, Homicide Lieutenant Randy Brandwood, Criminal Investigation Captain Roland Holmgren, and Officer Hector Jimenez. Deputy District Attorney Timothy Wagstaffe and Inspector Mark Moreno were present from the District Attorney's Office.

Officer Tanaka was advised that this was a voluntary statement and he could terminate the interview at any time.

Officer Tanaka has been a police officer with OPD since October 30, 2015 and assigned to Crime Reduction Team 1 for one month. Officer Tanaka is a Patrol Rifleman. He had to take part in an interview process and once selected he had to attend a two week school. Members of the Patrol Rifle Team can make their own decision to deploy their rifle. On March 11, 2018 he was working from 12:00 p.m. to 10:00 p.m. He was helping with "sideshow" enforcement in East Oakland when he received a phone call from fellow team member, Officer Hraiz. Officer Hraiz advised Officer Tanaka that he was at a call where an individual was on the ground with a gun and they were in need of the Bearcat. Officer Tanaka responded to Eastmont Mall where the Bearcat is located and proceeded to the 900 Block of 40<sup>th</sup> Street.

Upon Officer Tanaka's arrival he noted that an inner and outer perimeter was set up and that there was a DAT set-up. Sergeant Negrete told Officer Tanaka to park the Bearcat between 928-40<sup>th</sup> Street and 920 - 40<sup>th</sup> Street. Officer Tanaka said that Mr. Pawlik was between the two addresses.

When the Bearcat was parked, Officer Hraiz took a position inside the turret that allowed him to have an elevated view. Officer Tanaka said that Sergeant Webber handled the microphone for the public address system. Officer Tanaka said he took a position in the DAT as the "third person." Officer Tanaka stood on the railing on the outside of the Bearcat in an elevated position. Officer Tanaka was using his Colt AR 15 to provide cover. This position allowed Officer Tanaka to triangulate Mr. Pawlik and at the same time he was provided cover. When Officer Tanaka got on scene he did not see Mr. Pawlik move. He did not see any injuries or hear any noise coming from Mr. Pawlik. Officer Tanaka said he was about 15 meters from Mr. Pawlik. Officer Tanaka said that the lighting was daylight. He said it was shaded between the two houses, but he could still clearly see the gun in Mr. Pawlik's hand. Officer Tanaka said the backdrop was a fence and he thought the backdrop was clear.

Officer Tanaka was not sure of each officers' assignment because he arrived late, but he said that standard operating procedure for someone with a gun would include surrounding the subject, clearing the area of people, calling the subject out to a "position of disadvantage," and then

handcuffing the subject behind cover such as the Bearcat. Officer Tanaka said that was how his team would train. Once the Bearcat was parked Officer Tanaka's position on the DAT was self-initiated.

Officer Tanaka thought he heard Sergeant Webber giving commands to Mr. Pawlik from the PA system. Officer Tanaka could see that Mr. Pawlik was a male, white or maybe Hispanic, lying on his back, and he was rolled a little bit to his right side. Mr. Pawlik's head was facing north/west and his legs were facing south/east.

Mr. Pawlik's right hand was extended out towards the officers, but it was limp. Mr. Pawlik was holding a silver pistol in his right hand. The pistol was also pointing towards the officers. Officer Tanaka also said that there were homes behind the officers' location. Officer Tanaka did not remember the position of Mr. Pawlik's left hand. Officer Tanaka described the position of Mr. Pawlik's right arm as similar to being in a "low ready," and he could not tell if Mr. Pawlik was faking being asleep.

Officer Tanaka said that several commands were being given. The commands were given in English and in Spanish. Officer Tanaka said that was when he noticed Mr. Pawlik's upper body begin to move. Officer Tanaka said that Mr. Pawlik did "kind of a half sit up" with his upper body.

Officer Tanaka said that Mr. Pawlik looked up, down, and in the officers' direction. Officer Tanaka also said that Mr. Pawlik looked irritated. Officer Tanaka said that Mr. Pawlik "scanned" his head in the officers' direction and he "distinctly" remembered Mr. Pawlik looking at the officers. Then Mr. Pawlik began to raise his right arm with the pistol about a foot off the ground. Officer Tanaka said the gun was pointed at the officers. Officer Tanaka said he thought Mr. Pawlik was going to shoot him or another officer. Once Mr. Pawlik raised the gun, Officer Tanaka determined that was a lethal threat. Officer Tanaka said although the Bearcat offers cover he was still exposed. He was worried if Mr. Pawlik got a round off he could kill a fellow officer on scene or someone in the homes behind them.

Officer Tanaka said he was not sure if he was the first one to shoot because it seemed that every officer felt the threat at a similar time. Officer Tanaka said he brought his sights from a low ready to a contact ready. Officer Tanaka was using his red dot sight and it was focused on Mr. Pawlik's center mass. Officer Tanaka said he shot twice and then saw Mr. Pawlik roll backwards. The rounds were fired quickly. Officer Tanaka said it looked like the rounds were effective so he went to a low ready position. After shooting, Officer Tanaka said that Mr. Pawlik was lying on his back and the pistol was not in his hand anymore. Officer Tanaka explained that Mr. Pawlik presented a lethal threat and that he was not trained to use less lethal force against lethal force threats.

Officer Tanaka said that Sergeant Webber got the shield and officers prepared to secure Mr. Pawlik and render first aid because they had just used deadly force. Officer Tanaka said he didn't see it, but Sergeant Webber advised that he pushed the gun away from Mr. Pawlik. Officer Tanaka and Officer Berger handcuffed Mr. Pawlik. Officer Tanaka said that he saw Mr.

Pawlik's gun a few feet away from him. Officer Tanaka said he guarded the gun while officers provided medical care to Mr. Pawlik. Medical personnel responded and began to render first aid.

Officer Tanaka said that prior to Mr. Pawlik raising the gun, he had hoped that Mr. Pawlik would have dropped the gun and given up. Officer Tanaka said he did not want to have to shoot somebody. He said he has to live with shooting somebody the rest of his life. Officer Tanaka did not think that Mr. Pawlik fired a round.

At the conclusion of the interview, Officer Tanaka had the opportunity to review his body worn camera footage. The interview resumed with no further substantive questioning and concluded at 4:25 p.m.

#### Oakland Police Officer Brandon Hraiz

On March 12, 2018 at 4:46 p.m. Officer Brandon Hraiz was interviewed. Don Nobles from Raines, Lucia and Stern represented Officer Tanaka. OPD personnel also present were Sergeant Rich Vass, Sergeant Leo Sanchez, Homicide Lieutenant Randy Brandwood, Criminal Investigation Captain Roland Holmgren, and Officer Hector Jimenez. Deputy District Attorney Timothy Wagstaffe and Inspector Mark Moreno were present from the District Attorney's Office.

Officer Hraiz was advised that this was a voluntary statement and that he could terminate the interview at any time.

Officer Hraiz has been a police officer with OPD since July 3, 2014. On March 11, 2018, Officer Hraiz was assigned to Crime Reduction Team 1. He began his shift at 10:00 a.m. During the evening of March 11, 2018, Officer Hraiz was at the Police Administration Building with Officer William Berger and Sergeant Negrete.

OPD Dispatch advised a person was down on 40<sup>th</sup> Street. Due to the nature of the call the officers had their patrol rifles ready. Officer Berger, Officer Hraiz, and Sergeant Negrete responded to the scene in Sergeant Negrete's patrol car.

When they arrived at the scene pedestrian and vehicle traffic in the east and west directions was closed on 40<sup>th</sup> Street. They parked just east of the scene in the opposite lane of traffic. There was a patrol vehicle facing north/west in front of the alley where Mr. Pawlik was located.

Officer Hraiz said that Sergeant Webber and Officer Phillips were on the scene when they arrived. He took a position behind the driver's side of the patrol vehicle engine block looking north down the alley where Mr. Pawlik was lying. Officer Hraiz described Mr. Pawlik as a Hispanic male, wearing a black jacket and that he was lying down in a supine position. Mr. Pawlik's legs were together and his shins were facing south/east. Officer Hraiz could see a semi-automatic firearm. Officer Hraiz estimated that upon his arrival, he was about 20 feet away from Mr. Pawlik and that he could clearly see the gun in his hand. Officer Hraiz could see the gun clear enough to say and determine that the ejection port of the gun was facing towards the

ground. Officer Hraiz said that the incident occurred with plenty of daylight and they did not have to illuminate the alley to see Mr. Pawlik.

Sergeant Negrete began putting together a DAT. One of the contingencies was if Mr. Pawlik woke up and dropped the firearm they were going to call him back and take him into custody in front of the patrol vehicle.

Officer Hraiz was assigned primary lethal cover because he was assigned a rifle. Once they had enough officers on scene and the DAT was established, they were going to start making announcements. If Mr. Pawlik did not respond to the announcements they were going to use sirens and then an air horn. If that did not work they were going to use less lethal force. Finally, if none of that worked they were going to approach Mr. Pawlik with shields and use a Taser.

Sergeant Negrete had Officer Hraiz call for the Bearcat about five or ten minutes after they arrived. Officer Hraiz called some other officers from CRT1 to bring the armored Suburban and Bearcat to the scene. Officer Hraiz said that one of the advantages of having the Bearcat on scene was that the officers have a larger area to provide cover. A patrol vehicle does not offer the same protection level. The Bearcat is a completely armored vehicle that allows officers to get a closer position and also an elevated position.

Prior to the Bearcat arrival, Officer Hraiz said he could see the rise and fall of Mr. Pawlik's chest. Officer Hraiz also said that he saw Mr. Pawlik's hand and the gun move at one point.

When the Bearcat arrived they replaced the patrol vehicle with the Bearcat. It was facing north/east once it was parked. Sergeant Negrete assigned Officer Hraiz to a position inside the Bearcat turret so he could be in an elevated position. Once Officer Hraiz got into position inside the Bearcat turret, there was about two minutes before Mr. Pawlik woke up. Mr. Pawlik woke up before commands were given.

Mr. Pawlik's upper body started to come off the ground and he started to lean forward. Officer Hraiz said that Mr. Pawlik had a facial expression that was upset or angry. When Mr. Pawlik began to wake up and sit up, Officer Hraiz was looking at him through the aim point scope of the AR15. Officer Hraiz saw Mr. Pawlik open his eyes and look in his direction. Officer Hraiz said Mr. Pawlik started to cant his body upwards and started to sit up. Once he initially started to come up, Officer Hraiz noticed that the gun was still in Mr. Pawlik's hand and on the ground laying to the side with the barrel pointing towards the officers. As Mr. Pawlik sat up even more, the officers were giving him commands which he failed to obey. Officer Hraiz said that Mr. Pawlik seemed alert because his eyes were open, he was breathing and Officer Hraiz thought that Mr. Pawlik could clearly see the police were there. There were police cars on scene with the lights activated. Officer Hraiz thought Mr. Pawlik could hear their commands. Officer Hraiz then saw Mr. Pawlik's right arm rotate and slightly lift off the ground and the barrel point directly towards the officers. Officer Hraiz said he was scared for his life and everybody else that was on scene because Mr. Pawlik pointed the gun directly at the officers.

Officer Hraiz explained that Mr. Pawlik's actions presented an immediate threat of death and he elected to use deadly force. Officer Hraiz said he fired two or three rounds. Officer Hraiz said

he reassessed and saw that the gun was no longer in Mr. Pawlik's hand. Officer Hraiz said he put his rifle's safety back on and then noticed officers were approaching Mr. Pawlik with shields. He saw officers render first aid and he also saw medical personnel arrive on scene. Officer Hraiz said that Sergeant Webber rendered Mr. Pawlik's gun safe and he heard Sergeant Webber say there was a live round in the chamber.

At the conclusion of the interview, Officer Hraiz had the opportunity to review his body worn camera footage. The interview resumed with no further substantive questioning and concluded at 5:49 p.m.

#### **CIVILIAN WITNESS STATEMENTS:**

##### Witness #1

On March 11, 2018, Sergeant Omar Daza-Quiroz and Officer Jose Barocio interviewed Witness #1 at OPD.

On March 11, 2018, Witness #1 was taking his dog for a walk and talking to a friend on his phone. While walking he noticed a person on the ground near 928 - 40<sup>th</sup> Street. Witness #1 checked on the person and noticed a shiny semi-automatic gun in his hand. Witness #1 first thought it was a shiny cellular phone but when he took a closer look he said it was a gun. Witness #1 said he called 911. Witness #1 said that when he made the 911 call, it looked like a gun, but he was not sure. Witness #1 was scared the person might shoot him.

Witness #1 left his house at around 5:40 p.m., and he saw the person with the gun at about 6:15 p.m.

##### Witness #2

On June 5, 2018, Sergeant Vass and Officer Hector Jimenez interviewed Witness #2. Witness #2 is employed as a taxi cab driver. Witness #2 provided transportation for Mr. Pawlik on three occasions. Witness #2 said he only knew Mr. Pawlik from this business relationship. Each time Witness #2 picked Mr. Pawlik up it was at the Capri Hotel, located at 722 West MacArthur Boulevard, Oakland.

On one occasion Witness #2 drove Mr. Pawlik to 9<sup>th</sup> Street and Market Street in San Francisco. Mr. Pawlik met with a person briefly and then Witness #2 drove him back to the hotel.

The last time Witness #2 picked Mr. Pawlik up, he drove Mr. Pawlik to Walgreens located at 51<sup>st</sup> Street and Telegraph Avenue in Oakland. After Witness #2 dropped Mr. Pawlik back off at the hotel, Witness #2 noticed a black knife in the back passenger seat area. Witness #2 called and texted Mr. Pawlik to let him know he left the knife inside his cab. On March 6, 2018, Mr. Pawlik told Witness #2 not to go out of his way to return the knife.

Witness #2 described Mr. Pawlik as quiet and "chill." Witness #2 said Mr. Pawlik did not show any signs of unusual behavior. Witness #2 said Mr. Pawlik was homeless in San Francisco. Mr. Pawlik never talked to Witness #2 about wanting to hurt the police. Sergeant Vass asked Witness

#2 if he had any knowledge of Mr. Pawlik using or selling drugs. Witness #2 said that he never saw Mr. Pawlik participate in this behavior, but Witness #2 thought this may be what Mr. Pawlik was doing. Witness #2 never saw Mr. Pawlik with a gun, and he did not know if anyone had a problem with Mr. Pawlik.

#### **AUTOPSY RESULTS:**

On March 12, 2018, Dr. Paul Hermann performed an autopsy upon the body of decedent Joshua Ryan Pawlik at the Alameda County Coroner's Bureau in Oakland. Dr. Hermann determined the cause of death to be multiple bullet wounds. Dr. Hermann located 12 entry wounds. The examination of Mr. Pawlik's body revealed entry, exit, and complex bullet wounds in the area of the head, chest, abdomen, and legs.

A sample of the decedent's blood was submitted for complete drug screen testing. The toxicology report described decedent's blood to contain potentially toxic levels of Alprozolam, Benzoylecgonine, Fentanyl, and Morphine. The report described "effective" levels of Cocaine, Hydromorphone, and Tramadol. The decedent also had Levamisole and Egonine Methyl Ester present in his blood. The toxicologist concluded that the decedent was a poly substance drug user and was using up to his time of death.

#### **APPLICABLE CALIFORNIA LAW:**

The sole question addressed by the District Attorney's investigation was whether OPD Sergeant Frank Negrete, Officer William Berger, Officer Brandon Hraiz, and Officer Craig Tanaka violated any applicable laws. Whether or not the officers are criminally liable depends upon (1) the facts of the case, and (2) whether these facts constitute any criminal violations under existing statutory law. The quality of the evidence, if any, showing a criminal act or acts must be measured against the standards used by the District Attorney's Office in deciding whether or not to charge anyone with a crime. The California District Attorney's Uniform Crime Charging Standards manual directs that criminal charges shall not be brought unless the prosecutor, based upon a complete investigation and thorough consideration of all the pertinent information readily available to him or her, is satisfied that the evidence shows the accused is guilty of the crime to be charged. Additionally, the charging standards direct that there must be legally sufficient admissible evidence to prove each element of the crime. The admissible evidence must be of such convincing force that it would warrant conviction of the crime charged by a reasonable and objective fact finder after the fact finder has heard all the evidence and after considering the most plausible, reasonable, and foreseeable defenses that could be raised under the evidence.

The California Penal Code provides:

**Section 187:** Murder is the unlawful killing of a human being or fetus with malice aforethought.

**Section 188:** Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a human being. It is implied when the killing resulted from an intentional act, the natural consequences of the act are

dangerous to human life, and the act was deliberately done with knowledge of the danger to and with conscious disregard for human life.

**Section 192:** Manslaughter is the unlawful killing of a human being without malice.

**Section 196:** Homicide is justifiable when committed by public officers and those acting by their command in their aid and assistance, either –

- (1) In obedience to any judgment of a competent Court; or,
- (2) When necessarily committed in overcoming actual resistance to the execution of some legal process, or in the discharge of any other legal duty; or
- (3) When necessarily committed in retaking felons who have been rescued or have escaped, or when necessarily committed in arresting persons charged with a felony, and who are fleeing from justice or resisting such arrest.

**Section 197:** Homicide is also justifiable when committed by any person in any of the following cases:

- (1) When resisting any attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person; or,
- (2) When committed in defense of habitation, property, person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony, or against one who manifestly intends or endeavors, in a violent, riotous or tumultuous manner, to enter the habitation of another for the purpose of offering violence to any person therein; or,
- (3) When committed in the lawful defense of such person, or of a wife or husband, parent, child, master, mistress, or servant of such person, when there is reasonable ground to apprehend a design to commit a felony or to do some great bodily injury, and imminent danger of such design being accomplished; but such person, or the person in whose behalf the defense was made, if he was the assailant or engaged in mutual combat, must really and in good faith have endeavored to decline any further struggle before the homicide was committed; or
- (4) When necessarily committed in attempting, by lawful ways and means, to apprehend any person for any felony committed, or in lawfully suppressing any riot, or in lawfully keeping and preserving the peace.

**Section 199:** The homicide appearing to be justifiable or excusable, the person indicted must, upon his trial, be fully acquitted and discharged.

Any killing of a human being at the hands of another is a homicide. A homicide may be justifiable or criminal depending upon the circumstances. It is justifiable if done while resisting

a violent felony or in self-defense or in defense of another if it reasonably appears to the person claiming the right of self-defense or the defense of another that he or she actually and reasonably believed that he or she or another was in imminent danger of great bodily injury or death. (See *People v. Williams* (1977) 75 Cal. App. 3<sup>rd</sup> 731.) In protecting oneself or another, a person may use all force which he or she believes reasonably necessary, and which would appear to a reasonable person, in similar circumstances, to be necessary to prevent the injury, which appears imminent. (See CALCRIM 505.) In order to justify killing another person in self-defense or in the defense of another, actual danger of death or great bodily injury is not necessary. (CALCRIM 505.)

Pursuant to CALCRIM 505:

A homicide is justifiable and not unlawful when committed by a person who:

- (1) Reasonably believed he or she or someone else was in imminent danger of being killed or suffering great bodily injury;
- (2) Reasonably believed that the immediate use of deadly force was necessary to defend against that danger; and
- (3) Used no more force than was reasonably necessary to defend against that danger.

Pursuant to CALCRIM 507:

A homicide by a peace officer is justifiable and not unlawful when:

- (1) The killing was committed while overcoming actual resistance to some legal process or while performing any other legal duty;
- (2) The killing was necessary to accomplish one of those legal purposes; and
- (3) The officer had probable cause to believe that someone posed a threat of death or serious bodily harm, either to the officer or to others.

Probable cause exists to believe that someone poses a threat of death or serious bodily harm when facts known to the person would persuade someone of reasonable caution that the other person is going to cause death or serious bodily harm to another. (CALCRIM 507.)

The People have the burden of proving beyond a reasonable doubt that the killing was not justified. (CALCRIM 505 and 507.) It is not a criminal defendant's burden to prove that force was necessary or reasonable. The People must prove beyond a reasonable doubt that the officer did not have an actual or reasonable belief in the need for self-defense or the defense of others. Absent direct evidence that an officer did not actually or reasonably believe in the need for force, circumstantial evidence must be used. If two reasonable conclusions can be drawn from circumstantial evidence, however, and one of those reasonable conclusions points to innocence, jurors are instructed that they must accept the one that points to innocence. (CALCRIM 224.)

The United States Supreme Court has held that a police officer's use of force should be analyzed under the reasonableness standard of the Fourth Amendment to the United States Constitution. The Supreme Court stated, "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight . . . the calculus of reasonableness must embody allowance for the fact that police are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." Graham v. Conner (1989) 490 US 386, 396-397.

If the killing was not justifiable as outlined above, or excusable as in an accidental killing, only then would it be criminal. Moreover, if an act is committed by reason of a mistake of fact which disproves any criminal intent, it is not a crime. Therefore a person is not guilty of a crime if he or she commits an act under an actual belief in the existence of certain facts and circumstances which, if true, would make the act lawful. (See CALCRIM 3406.)

In the present case, to establish criminal liability, the evidence must show beyond a reasonable doubt that the OPD officers killed Mr. Pawlik and the officers did not reasonably believe that they or another was in imminent danger of death or great bodily injury.

### **CONCLUSION:**

The OIS Team conducted a separate, parallel investigation and review of the facts and circumstances leading to the death of Mr. Pawlik.

The credible and admissible evidence shows that all four officers acted in what they actually believed to be self-defense or defense of others. The examined evidence does not support the contention that the shooting of Mr. Pawlik was criminal. At the time the officers fired their weapons, they had reason to believe that Mr. Pawlik would shoot the officers, their fellow officers, and other residents of the community near the scene. When Mr. Pawlik pointed his loaded pistol at the police officers, they had reason to believe he would shoot at them. Mr. Pawlik did not comply with the repeated commands from the officers to drop the gun and take his hand off the gun.

The statements of the shooting officers are corroborated. Most importantly, all four shooting officers and the beanbag shotgun shooter all shot at nearly the exact same time in response to the threat. The audio of the body-worn cameras corroborated that the shooting was over after just over two seconds. After giving commands for 37 seconds, the officers all perceived the threat from Mr. Pawlik and shot at the same time. This corroborates the officers' statements of how they saw Mr. Pawlik raise the gun in their direction.

Though the body worn camera footage from the hood of the Bearcat does not capture the position of Mr. Pawlik's pistol at the time of the shooting, video analysis determined that Mr. Pawlik's right side moved just before the shooting. The video showed Mr. Pawlik looking in the direction of the officers after he woke up. The footage showed how Mr. Pawlik did not comply with the numerous orders to drop the weapon while he appeared to be looking in the direction of the officers giving the commands. Rather than follow the orders of the police, Mr. Pawlik

appeared to look in the direction of the officers, sit up further, and make a movement with his right arm a split second before the officers fired their weapons. Though the footage does not clearly show how high Mr. Pawlik raised his pistol, the movement in the area of his shoulder and the officers' nearly simultaneous shooting corroborates the shooting officers' assertions that Mr. Pawlik pointed the gun in their direction.

The Bearcat offered protection, but the officers were still potentially exposed to gunfire if Mr. Pawlik had shot at them. The Bearcat did not cover the officers' entire bodies. The officers that were not in the turret had their heads exposed to potential gunfire. Additionally, the safety of any civilians in the area was at risk. The area of the incident is residential with many homes close together. The homes across the street were downrange from the direction Mr. Pawlik pointed his pistol. All of the homes across the street and adjacent to Mr. Pawlik's position abutted the street. There are few obstacles that would interfere with the path of a bullet from his gun if he would have shot at the officers. Though the officers attempted to evacuate the homes across the street, there is no guarantee that civilians in the area would have left their homes or been completely safe from the possibility of Mr. Pawlik shooting in their direction. Moreover, had Mr. Pawlik fired the gun, the force and range of fired bullets posed a risk of injury or death to any number of persons located in the densely populated, urban area.

Given the evidence of Mr. Pawlik's actions, the officers' decision to shoot Mr. Pawlik appears reasonable under the circumstances. All four officers believed that Mr. Pawlik intended to kill them individually or fellow officers.

Given the totality of the circumstances, it appears that each of the four officers reasonably believed that he or other officers or civilians were in imminent danger of great bodily injury or death, at the time the shots were fired. Further, there is no evidence upon which this office could rely to disprove the officers' stated belief that they feared for their own lives and the lives of their fellow officers and civilians.

The analysis of this investigation includes consideration of whether it was reasonable for the officers to act when they did, rather than waiting to see if Mr. Pawlik would eventually comply with the officers' commands to drop his gun. The incident developed rapidly once Mr. Pawlik woke up. This required the four officers to make rapid decisions in a dangerous situation. The law requires that the reasonableness of the officers' actions be assessed with the understanding that "police are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving." This was such a circumstance. Moreover, had the officers waited to take action, the consequences of such inaction could have resulted in the killing of fellow officers or nearby residents. The likelihood of such a result is not insignificant in this case.

Accordingly, in applying the California District Attorney's Uniform Crime Charging Standards to the present case, there is insufficient evidence to support a criminal prosecution against Sergeant Frank Negrete, Officer William Berger, Officer Brandon Hraiz, and Officer Craig Tanaka, and this Office contemplates no further action in this case.